92-548

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

In Re

KIRK L. WHITCOMBE, Petitioner

v.

JUDGE COUGHENOUR - UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON. JUDGES FLETCHER, LEAVY and T.G. NELSON - UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Respondents

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Does a federal court rule of civil procedure, created through the authority and dictates of 28 USC 2072, lose its identity and obligation to Congressional 28 USC 2072 when states use that court rule for its federal excellence and for the same purpose as it is used federaly in light of the fact that Petitioner alledges the court rule TWICE abridged and modified his substantive rights while being used in a state court and 28 USC 2072 inaquivicably states "(b) Such rules shall not abridge, enlarge or modify any substantive right."? (Emphasis added.)

2. Is Congressional Enabling Act Statute, 28 USC 2072, unconstitutional since it allows the judiciary to additionaly legislate laws as well as keep their exclusive right to enforce laws on laws that directly effect citizens access to their rights to a jury trial - a special citizens

right that is Constitutionaly held as "inviolate" from government temptation?

3. Does the United States Supreme Court have the authority and willingness to declare 28 USC 2072 unconstitutional since Congress through 28 USC 2072 may have mistakenly given the Judiciary the Constitutionaly forbiden right to legislate as well as enforce laws directly controling citizens access to their rights to a jury trial, a special right that is Constitutionaly held as "inviolate" from tempting government intervention, especialy the Judiciary, which may be an enjoyable government created power through 28 USC 2072 that the Judiciary may want to continue to entertain unchallenged?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Kirk L. Whitcombe, and the Respondents, Judge Cougenhour, United States District Court For The Western District Of Washington, Judges Fletcher, Leavy and T.G. Nelson, United States Court Of Appeals For The Ninth Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished. The Order decision of June 26, 1992, is reprinted in the Appendix hereto, page 1a, infra.

The order of the United States District Court, Western Washington of Washigton, at Seattle, on Defendant's Motion To Dismiss was entered March 13, 1992, has not been reported. It is reprinted in the Appendix hereto, page 2a, infra.

Invoking federal jurisdiction under 28 USC 2072, the Petitioner brought this suit originaly in the U.S. District court for the Western District of Washington State at Seattle Washington on September 23, 1991 alledging Fed. R. Civ. P. 38 is in conflict with Congressional 28 USC 2072. On Oct. 11, 1992 Plaintiff filed Plaintiff's Motion For Change Of Venue And Re-Assignment Of Case. On Jan. 6, 1992 Plaintiff's Motion For Change Of Venue And Re-Assignment Of Case was denied. On March 10, 1992 U.S. District Court granted Oral Arguement On Defendants Motion To Dismiss. Oral argument was on March 13, 1992. On March 13, 1992 Defendants Motion To Dismiss was granted. On March 20, 1992 Plaintiff filed Plaintiff's Motion For Reconsideration For Not Enforcing Congressional 28 USC 2072, requesting Oral Argument and a Three Judge Court. On April 16, 1992 U.S. District Court minute order denied Plaintiff's Motion For

Reconsideration. On May 12, 1992 Plaintiff/Appelant filed a Writ of Mandamus in the United States Court Of Appeals For The Ninth Circuit. On June 26, 1992 The Court Of Appeals for the Ninth Circuit rendered an Order Decision denying Plaintiff/Appelants' Writ of Mandamus.

The Jurisdiction of this Court for this Writ of Mandamus is found under 28 USC 1651.

STATUTES, CONSTITUTIONAL PROVISIONS, AND COURT RULES INVOLVED

Federal Rules Of Civil Procedure:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise

the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by rule 5(d) constitutes a waiver by jury made as herein provided may not be withdrawn without the consent of the parties.

Washington State Right To a Jury Trial

Art. 1, Section 21, Washington State Constitution:

The right of trial by jury shall remain inviolate, but the legislature may provide

for a jury of any number less than twelve in courts not of record, and for a verdict by nine of more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Washington State Court Rule Administering Jury Trial Right.

Rule 38, Rules for Superior Court, State of Washington:

Rule 38. JURY TRIAL OF RIGHT

(-) Defined. A trial is the judicial examination of the of the issues between the parties, whether they are issues of law or of fact.

(a) Right of Jury Trial Preserved. The right of trial by jury as declared by Article 1 Section 21 of the Constituion or as given by statute shall be preserved to the parties inviolate.

(b) **Demand for Jury.** At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing, by filing the demand with the clerk, and by paying the jury fee required by law. If before the case is called to be set for trial no party serves or files a demand that the case be tried by a jury of twelve, it shall be tried by a jury of six members with the concurrence of five being required to reach a verdict.

(c) **Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issuers so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for

trial by jury of any other or all of the issues of fact in the action.

(d) Waiver of Jury. The failure of a party to serve a demand as required by this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) [Return of Jury Fee -- When Forefited.] [Rescinded effective August 7, 1981.]

Amended effective January 1, 1972, July 20, 1973; August 7, 1981.]

28 USC 2072 ENABLING ACT

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the

Chief Justice at or after the beggining of a regular session thereof but not latter than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary not withstanding, shall in any way limit, supersede, or repel any such rules heretofor prescribed by the Supreme Court.

UNITED STATES CONSTITUTIONAL FIFTH AMENDMENT, PRINCIPLE 228

"No person shall be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This is a Writ of Mandamus brought by Petitioner (Kirk Whitcombe), seeking this courts authority to direct and compell the lower federal courts Constitutional duty to enforce the law. In particular, Congressional 28 USC 2072 scrutiny upon United States Supreme Court Rule of Civil Procedure, CR 38.

Petitioners Complaint in the lower federal courts that Fed. R. Civ. P. 38 is in conflict with the Constitution pursuant to Congressional 28 USC 2072, case #C91-1321C was denied without consideration of 28 USC 2072 dictates or Petitioners merits even though Petitioner notified the lower District Court in his Motion of Reconsideration that a Writ of Mandamus would be applied for if the lower court would not enforce Congressional 28 USC 2072

scrutiny.

Subsequently Petitioners Writ of Mandamus was denied without comment in the Appelate Court case # 92-70321, leading to presenting this Writ of Mandamus to the Supreme Court.

The facts Petitioner uses to support his complaint that Fed. R. Civ. P. 38 is in conflict with 28 USC 2072 were not disputed or denied. Rather lower court judge Coughenours' "ORDER ON DEFENDANT'S MOTION TO DISMISS", backed by the Appelate Courts denial "ORDER" gives five reasons why 28 USC 2072 should not be enforced on Fed. R. Civ. P. 38 and why the merits of Petitioners complaint should not be considered. The basic overiding reason being their interpretation of 28 USC 2072. According to the lower court judges, 28 USC 2072 only guarantees a federal court rule will not

abridge or modify citizens substantive rights while being used in federal courts even though 28 USC 2072 does not limit the use of such court rules and furthermore specificaly states "Such rules shall not abridge, enlarge, or modify "any" substantive rights". Empahasis added.

ARGUEMENT ON WHY THE FIVE REASONS THE LOWER COURT JUDGES GIVE TO NOT WANT TO ENFORCE 28 USC 2072 ARE IN ERROR.

"First, the principal of soveriegn immunity bars this action." "("[N]o action lies against the United States unless the legislature has authorized it.")" Judge Coughenours Order P.3a. The United States has consented to Citizens suing to enforce 28 USC 2072, or the United States would not have bothered to legislate it. Congressional 28 USC 2072 is a statute that prohibits federal court rules of civil

procedure abridging or modifying "any" citizens substantive rights. Plaintiff's complaint is only asking Congressional 28 USC 2072 be enforced so that Petitioner can once again have his substantive rights declared as inviolate. By the nature of this action the United States has therefore consented to be sued to the capacity of enforcing 28 USC 2072.

"Second, plaintiff has not complied with Fed. R. Civ. P. 4(d)(4)". Judge Coughenours ORDER P.4a To the contrary and as Exhibit "A" clearly shows Plaintiff did comply with Fed. R. Civ. P. 4(d) (4). The defendant timely responded to Petitioners Complaint and all pleadings with no recognizable inconvenience so there is no indication that plaintiff failed to comply with Fed. R. Civ. P. 4(d)(4). Additionaly, even if there was some technical error by the Plaintiff, which Petitioner is still unaware of, it is very

disturbing by the Plaintiff to find the lower court judges not enforcing their own court rules, rules that are not in question to be in violation of the Consitution. Fed. Rule of Civ. P. 61, which inaquivicably states - "Harmless Error" "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties." Rule 61.

Third reason the lower court judiciary uses for not enforcing 28 USC 2072 is because the lower court judiciary thinks if it did so it would collateraly attack two prior court decisions. The two prior court cases did not envolve the same jurisdiction and federal question . In fact the first court case, Kirk L. Whitcombe v. Weyerhaueser, 81-2-17032-3, Washington State King County Superior Court did not even envolve a federal question because

Petitioner was appealing to the state courts to find out why Washington State Supreme Court allowed the lower courts and judges to twice set his trial as a non-jury without his specific authorization, knowledge, and consent and then deny his three pre-trial motions for his "inviolate" rights to a jury trial. The second trial federal case Whitcombe v. Weyerhaeuser Company et al., No. C87-1143C, United States District Court for the Western District of Washington (1988), involved a federal question, but one specificaly arrising from the State Supreme Court decision thereby federaly questioning if the state defendants interpretated Fed. R. Civ. P. 38 that they were using in their forum in a manner violative of the Fourteenth Amendment.

In stark contrast the case at bar is federaly questioning if Fed. R. Civ. P. 38 is in conflict with Congressional 28 USC

2072 based soley upon the federal appelate judges forum for rendering their MEMORANDUM DECISION decision in Kirk L. Whitcombe v. Weyerhaueser, Case # 88-3754, case # 90-910. Petitioner is not challenging the decision, rather the proceedings which the ordinary rules would treat as an adequate constitutional forum. Gibson v. Berryhill, 411 U.S. 564, 577 (1973) and Hernandez v. Finley, 471 F. Supp 516, 519-520.

In Kirk L. Whitcombe v. Weyerhaueser, Case # 88-3754, three appelate ninth circuit court judges made their startling statement nakedly stating "In that action Whitcombe first waived a jury trial." Kirk L. Whitcombe v. Weyerhaueser, Case # 88-3754 and then proceeded in describing why Petitioner could not have his substantive right back after Fed. R. Civ. P. 38 dictated to the judges that he had waived it. There was no factual evidence of a waiver,

contested or otherwise, only the three judges relience of Fed. R. Civ. P. 38 dictates being accepted as settled law. Had the three judges not have accepted Fed. R. Civ. P. 38 dictates as settled law they would have certainly discovered from Petitioners factual alledgations that he had never waived his substantive rights to a jury trial. Subsequently Petitioner brought a new and different cause of action, a 28 USC 2072 action against Fed. R. Civ. P. 38 alledging his and all other citizens substantive rights to a jury trial are abridged and modified by the use of Fed. R. Civ. P. 38 as revealed in case # 88-3754.

Judge Coughenours accusations that "Plaintiff was a party to each final decision and had ample opportunity to argue the issue." is very misleading. Each final court decision unpredictable as it was, created a new federal question, not an

appealable issue. Futhermore Petitioner was accused by State and now Federal government "under color of Fed. R. Civ. P. 38 law" of twice "waiving" his substantive rights to a jury trial. He has never been allowed to have a trial to show he is innocent of those naked government accusations which government used as an excuse to twice take his substantive "inviolate" right to a jury trial. Petitioner may have had "ample time to argue the issue", but without government co-operation of allowing the governmentaly accused petitioner the Constitutional right to have his day in court and face his government accusers, and make his government provide proof of their obsurd allegations, Petitioner certainly has not seen any justice, nor has their been any semblence of Constitutional Due Process protection provided citizens so that they can preserve their rights to a jury trial as Constitutionaly "inviolate" when confronted

with an abusive and arbitrary government law.

Fourth reason for not enforcing 28 USC 2072, lower court judiciary alledges Plaintiff's case fails to state a claim upon which relief can be granted. According to 28 USC 2072 Petitioner is Constitutionaly guaranteed to not have "any" of his substantive rights abridged or modified. A state adopted federal right is a substantive right. A federal court rule that is used to administer that same inviolate federal right in state courts is used by states for its federal excellence of being under the restrictions of 28 USC 2072, guaranteeing not to abridge or modify "any" citizens substantive rights. Therefor there is no reason why the dictates of 28 USC 2072 should not apply in like situations in State courts otherwise Congress would not have used the word "any".

Fifth reason for not wanting to enforce 28 USC 2072, Judge Coughenour alleges "plaintiff states no case or controversy." "Fed R. Civ. P. 38 does not apply to Washington State Courts." The evidence to the contrary is overwhelming. Washington State Appelate court forum refers to their use of the excellence of Fed. R. Civ. P. 38 in their state courts. Three federal Ninth Circuit Appelate Judges forum undesputedly used Fed. R. Civ. P. 38 dictates rather than reviewing Petitioners facts by arbitrarily coming up with their factless decision "In that action Whitcombe first waived a jury trial." therefore not even considering if Fed. R. Civ. P. 38 was factualy correct in the way that they were interpreting it, Kirk L. Whitcombe v. Weyerhaueser, Case # 88-3754. Again there never has been any facts, contested, or otherwise by any state or federal court or judge that Petitioner had ever voluntarily relinguished,

neglected, or otherwords "waived" his substantive rights - only the naked assurtions of Fed. R. Civ. P. 38 stating Petitioner can't have his Constitutionaly held inviolate rights because he twice waived his substanitve rights by allowing government to set his case for non-jury without his specific authorization, knowledge, and consent. Without facts of a "waiver" government has no Federal Due Process Right to take citizens substantive rights away on excuses from naked accusations. A government created law can never be substituted for facts, or it is nothing more than a legal fiction and arbitrary. "Certainly, a substantive right of a litigant, existing under a constitution or statute, can not be taken away by a mere court rule standing alone" State v. Pavelich, 153 Wash. 380, 382 (1929). A federal court rule, like a statute, creating a presumption that is arbitrary or that

operates to deny a fair opportunity to repel it, violates the due process clause of the Constitution. Bailey v. Alabama, 219 U.S. 219, 233.

Washington State accepts Fed. R. Civ. P. 38 for its excellence of complying with 28 USC 2072, Judge Coughenour identifies Fed. R. Civ. P. 38 which Washington State uses as a Washington state law and says its a state matter, - so where does Citizens demand for Constitutional scrutiny become eligeable on this ignorant government impasse? Constitutional Due Process used in federal courts has to carry on and maintain that federal excellence in like situations in state courts otherwise the United States Fifth and Fourteenth Amendments would not be compatable. States who use federal court rules as settled law because of their excellence of complying with 28 USC 2072 have no federal jurisdiction to federaly

answer the question if the court rule they are using is in fact in conflict with federal 28 USC 2072.

WHY FED. R. CIV. P. 38 IS IN CONFLICT WITH THE CONSTITUTION

FED. R. CIV. P. 38, a law that promises "in words" to preserve citizens substantive rights to a jury trial as "inviolate" when used in federal or state courts, does just the opposite when used by government. As shown undesputedly in Petitioners case, Fed. R. Civ. P. 38 allows judges and courts to set Citizens trials as non-jury without a citizen litigants specific authorization, knowledge, and consent while the citizen was undesputedly planning to make his demand for trial at a different latter time and with his trial demand he was going to make his Constitutionaly held demand for a jury trial which is supposed to be Constitutionaly held

as "inviolate" from government interevention. Since the judges and courts beat Petitioner to the punch because they provided no notice or opportunity of their intentions, Petitioner was humanly unable to make his timely demand for his "inviolate" rights as prescribed by Fed. R. Civ. P. 38. Subsequently Petitioner filed three pre-trial motions for his "inviolate" right to a jury which were all denied without comment and the reasoning. The three motion denials were not revealed until later in the state appelate process.

DOES CONGRESSIONAL STATUTE 28 USC 2072 CREATE A CONSTITUTIONAL SEPARATION OF POWERS ERROR?

Perhaps Congress errored in creating 28 USC 2072 by allowing our Judiciary to broaden their Constitutionaly restrictive enforcement capabilities so that our

Judiciary can now legislate as well as enforce laws that encompass a court rule directly effecting Citizens rights to a jury trial, Constitutionaly held as "inviolate" from government temptation. Congress "says" our judiciary can legislate laws that handle citizens Constitutionaly held "inviolate" right to a jury trial, as long as those laws will not abridge or modify that citizens substantive right, but Congressional 28 USC 2072 giving the Judiciary the independant right to create and enforce their own laws which directly effect what our Constitutional forefathers warned must be kept "inviolate" from government temptation has now factualy taken its Constitutionaly violative course. In this case at bar, this Writ of Mandamus, the Judiciary has the Constitutionaly unprecidented option of deciding whether or not to enforce their self legislated Fed. R. Civ. P. 38 or elect to enforce the supreme

Constitution, but what is there to prevent the Judiciary from tempting to favoring their own created government laws that Congress allowed them to create through 28 USC 2072 rather than enforce the dictates of the supreme Constitution since the Judiciary has the only Constitutional authority to enforce the law?

SHOULD THE CONSTITUTIONALITY OF A STATUTE THAT ALLEDGEDLY FAVOURS USURPATION OF POWER BY THE JUDICIARY BE DETERMINED BY THE JUDICIARY?

The Federal question asked in Question # 3 of this Writ of Mandamus is not answered in Marbury v. Madision, 1 Cranch 137 (1803). Marbury v. Madison did not deal with the constitutionality of a statute that is alledgedly in conflict with the judiciary for allowing the judiciary to violate the Constitutional Separation of Powers

endoctorine and gain legislative supremacy, usurpation of power, which could ultimetly lead to a unchecked one branch government dominant power.

REASONS FOR GRANTING THE WRIT

The merits of Petitioners Complaint clearly show Fed. R. Civ. P. 38, a law that is used universaly in all Federal trial Courts and most state courts which elect to adopt the seventh Amendment, operates in a manner to deprive citizens right to have a jury. A jury is Constitionaly held as "inviolate" in all Federal Courts and also in all state Courts which elect to adopt the Seventh Amendment. In states which adopt the Seventh Amendment, although not federaly required to do so, that State Established federaly adopted Right is federaly protected by the United States 14th Amendment Evitts v. Lucy 469 US 387 (1985). But

Constitutional Fourteenth Amendment scrutiny was unexpectedly blocked by three Ninth Circuit Appelate judges using Fed. R. Civ. P. 38 dictates rather than the factual substance found in Petitioners case # 88-3754. In that case decision it is very clear that the judges didn't care if government had any facts to support Fed. R. Civ. P. 38 implications of a waiver - the dictates of Fed. R. Civ. P. 38 is arbitrary regardless of the absence of facts.

At this point in time, having gone through the lower court procedure there clearly is no other adequate means to attain the desired relief, because the dictates of Fed. R. Civ. P. 38 being accepted as settled law creat a forum that repels any collateral attack on that Court Rule. Petitioner having already gone through the appelate court is damaged in a way not correctable on lower court appeal, district court's order

is clearly erroneous as a matter of law, subject order, unless corrected will be an oft repeated error, and the Appelate Courts recent order using Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). as a reason to deny Petitioners Writ of Mandamus raises new and important problems of law of first impression and why this Writ of Mandamus is now with the United States Supreme Court.

Congress directly forbids courts from legislating and enforcing laws that abridge and modify citizens substantive rights, 28 USC 2072, and accordingly this court has in the past dutifuly responded to enforcing Congressional statutes that forbid specified court actions. Ex Parte Fisk, 113 US 713.

Fed. Civ. R. P. 38 has not been interpreted wrong which was originaly thought by Petitioner. Judges and Courts

have already been federaly questioned if they were interpreting Fed. R. Civ. P. 38 in a manner violative of Constitutional Due Process. Kirk L. Whitcombe v. Weyerhaeuser Corporation, et al., Case # 90-910.

CONCLUSION

If citizens are going to be accused by Fed. R. Civ. P. 38 of waiving their right to as jury trial by not making their demand at or before the time their case is set for trial, judges and courts must tell citizens prior to the time of judges and courts setting their case for trial of their government intentions so citizens can at least have a chance to preserve their right to a jury trial as "inviolate".

The District Courts reasoning for not addressing the merits of Petitioners complaint are circumventing their more

important obligation of enforcement of Congressional 28 USC 2072 on Fed. R. Civ. P. 38 as it applies to, not an incidental wish of one citizen, rather the "inviolate" rights of all citizens that regardless of government opinion, must be left "inviolate" from government intervention. "Maintenance of the jury as a fact - finding body is of such importance and occupies so firm a place in our history and jurisprudence that any curtailment of the right to a jury trial should be scrutinized with the utmost care" Beacon Theatres Inc., v. Westover, US District Judge, ET AL., 359 US 500 (1959). "The limitation imposed by the Amendment is merely that enjoyment of that right of trial by jury be not obstructed" Ex Parte Peterson, 253 U.S 300 p. 310. The right to a jury trial being held Constitutionaly inviolate is being obstucted by Fed. R. Civ. P. 38. If only the judiciary will follow the dictates of Congressional 28 USC 2072 the

judiciary will dutifully find Petitioners complaint is real and legitimete. However because of 28 USC 2072 there is no way of forcing the judiciary to take Constitutional precidence over enforcing their own zeously protected self legislated laws. If the Judiciary refuses to do so then it will become self evident that 28 USC 2072 is in error for allowing the judiciary take the role of Congress and legislate laws in the first place. Proceduraly if this event occurs the next step would be to collateraly attack 28 USC 2072.

For the above stated reasons this Writ of Mandamus should be granted. Thank you.

DATED This 21 Day of September 1992.

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ORDER DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, BEFORE CIRCUIT JUDGES FLETCHER, LEAVY and T.G. NELSON:

The petition for writ of mandamus is denied. See Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977).

MoCal 6/23/92/hc

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Filed June 26 1992 Cathy A. Catterson, Clerk U.S. Court Of Appeals

ORDER OF UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE IN CAUSE NO. C91-1321C ON PLAINTIFF'S MOTION FOR RECONSIDERATION, ENTERED MARCH 13, 1992, PER JUDGE COUGHENHOUR, UNITED STATES DISTRICT JUDGE:

This matter is before the court on Defendants' Motion to Dismiss or in the Alternative for Summary Judgement. Having heard oral argument and reviewed all relevant documents, the court finds and rules as follows:

In this case plaintiff, for the second time, asks this court to address the alledged denial, in state court, of his right to a jury trial. His action appears to request equitable relief in the form of mandamus and pecuniary relief in the form of damages against the United States' government. Specifically, plaintiff desires this court to order a jury trial in lieu of

the bench trial in Kirk Whitcombe and Dean Baker, Trustee for the Estate of Kirk Whitcombe v. Weyerhaeuser Company, No. 81-2-17032-3, Superior Court for the County of King (1985), and/or a jury trial in Whitcombe v. Weyerhaeuser Company, et al., No. C87-1143C, United States District Court for the Western District of Washington (1988). For several reasons, this court must dismiss plaintiff's case.

First, the principle of sovereign immunity bars this action. Midwest Growers Cooperative v. Kirkemo, 553 F.2d 455, 465 (9th Cir. 1976) ("[N]o action lies against the United States unless the legislature has authorized it.") Plaintiff bears the burden of pointing to an unequivocal waiver of sovereign immunity. Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984). Yet plaintiff has not set forth any waiver of sovereign immunity which allows the United States,

itself to be sued when the promulgation of one of the Federal Rules of Civil Procedure is at issue. Indeed, no such waiver exists.

Second, plaintiff has not complied with Fed. R. Civ. P. 4(d)(4). The United States Attorney for the Western District of Washington avers that she has not received personal service, and no evidence to the contrary exists.

Third, plaintiff's attempt to collaterally attack the prior state and federal court decisions is barred by collateral estoppel. The doctorine of collateral estoppel applies if four elements exist: (1) identical issues, (2) a final judgment on the merits, (3) the party against whom the plea is asserted is a party to or in privity with a party to the prior adjudication, and (4) application of the doctorine does not work injustice on the party against whom the doctorine is to be applied. See Bruce Rental, Inc. v. Clark

Equipment Company, 713 P. 2d 128, 131, 42 Wash. App. 644 (1986); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). Each element exists here. The issue of whether plaintiff's alleged right to a jury trial was improperly denied has been considered by state and federal courts at every level. Plaintiff was a party to each final decision and had ample oppotunity to argue the issue.

Fourth, plaintiff's case fails to state a claim upon which relief can be granted. Plaintiff argues that Fed. R. Civ. P. 38 violates rights afforded by the Fifth and Seventh Amendments. The Fifth Amendment applies only to Federal proceedings, Feldman v. United States, 64 S.Ct. 1082 (1944), as does the Seventh Amendment, Olsen v. Trust Company of Chicago, 245 F. 2d 522 (7th Cir.). Therefore, the state proceedings at issue could not have abridged these federal constitutional rights. In the federal

proceedings at issue, even if Fed. R. Civ. P. 38 were implicated, which it is not, plaintiff's constitutional rights could not have been violated. Fed. R. Civ. P. 38 is constitutional. Rutledge v. Electric Hose and Rubber Company, 511 F.2d 668, 674 (9th Cir. 1975).

Fifth, Plaintiff states no case or controversy. Fed. R. Civ. 38 does not apply to Washington State Courts. Likewise, the rule was not implicated in the federal case because this court dismissed that case in motion.

Accordingly, the court grant's defendant's motion to dismiss.

The Clerk of this Court is instructed to enter judgement pursuant to this Order, and to send copies of this Order and of the judgement to plaintiff, Kirk L. Whitcombe, appearing pro se herein, and to all counsel of record.

DATED this 13 day of March, 1992.

John C. Coughenour

United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KIRK L. WHITCOMBE, Plaintiff, v. UNITED STATES Defendant.	NO. C91-1321C AFFIDAVIT OF SERVICE. RETURN ACKNOWLEDGEMENT BY: 1. CERTIFIED LETTER 2. DEFENDANT'S RESPONSE MOTION TO COMPLAINT. (DEFENDANT DID NOT RETURN FORM 18A)

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, KIRK L. WHITCOMBE, being first duly sworn, depose and state as follows:

That on 7TH day of October 1991, in accordance to Fed. Rules of Civil Procedure Rule 4, c (2) (C) (ii) and c (E) (d) (4), I Deposited in the US Mail Plaintiff's SUMMONS AND COMPLAINT with two copies of FORM 18A, A NOTICE AND ACKNOWLEDGEMENT and a return envelope, postage prepaid, addressed to the sender. Postage was pre-paid in an envelope addressed as follows:

Attorney General of United States
800 - 5th Ave. Suite 3600
Seattle, WA. 98104

DATED this 23 day of December, 1991.

Kirk L. Whitcombe

KIRK L. WHITCOMBE Pro-Se
11909 S.E. Tanner Rd. Lot #5
North Bend Wash. 98045
206-831-6011, 831-6066

8a

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Attorney Gen. of U.S.
600 - 5th Ave. Su. Te 3600
Seattle, WA. 98104

4a. Article Number
P 672 - 867 - 324

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
OCT 08 1991

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
[signature]

PS Form 3811, November 1990 *U.S. GPO: 1991—287-088 DOMESTIC RETURN RECEIPT

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Dept. of Justice
Atty. General U.S.
Constitution Ave & 10th St NW
Washington DC 20530

4a. Article Number
672 867 376

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☒ COD
☐ Express Mail ☐ Return Receipt for Merchandise

DEPARTMENT OF JUSTICE

7. Date of Delivery
SEP 27 1991

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)
P. E. Schellman

6. Signature (Agent)
Patricia E. Schellman
PATRICIA E. SCHELLMAN

PS Form 3811, November 1990 *U.S. GPO 1991—287-088 DOMESTIC RETURN RECEIPT

9a

BEST AVAILABLE COPY